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Supreme Court, U.S.
FILED
AUG 12 1994
OFFICE OF THE CLERK

No. 94-39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

HENRY D. SEDGWICK STERN and WALTER B. SLOCOMBE, Personal Representatives of the Estate of Philip M. Stern,

Petitioners,

vs.

GENERAL ELECTRIC COMPANY, JOHN F. WELCH, JR., LAWRENCE A. BOSSIDY, EDWARD E. HOOD, JR., RICHARD T. BAKER, JAMES G. BOSWELL II, SILAS C. CATHCART, CHARLES D. DICKEY, JR., LAWRENCE E. FOURAKER, HENRY H. HENLEY, HENRY L. HILLMAN, ROBERT E. MERCER, GERTRUDE G. MICHELSON, BARBARA SCOTT PREISKEL, LEWIS T. PRESTON, FRANK H. T. RHODES, ANDREW C. SIEGLER and WALTER B. WRISTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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This brief is respectfully submitted in reply to Respondents' Brief in Opposition dated August 4, 1994.

CORRECTIONS TO RESPONDENTS' STATEMENT OF THE CASE

Respondents' brief states that the District Court dismissed the FRLA claim in the original complaint in 1986, and that the dismissal was affirmed by the Court of Appeals (p. 3). What Respondents omit to state is that the basis for that affirmance was a factual misrepresentation made by GE in its brief to the Court of Appeals, to wit:

> None of the individual defendants has or had *any role whatsoever* in the operation of the GE/PAC or its distribution of contributed funds. (Emphasis added.)

The assertion that none of the Directors had "any role whatsoever" in the GE/PAC was deliberate concealment of the active role played by Board Chairman John F. Welch in the solicitation of PAC contributions. Against the true factual record subsequently developed through discovery, it is clear that the unqualified denial of "any role whatsoever" was a knowing misrepresentation by GE Management to deceive their own outside counsel and the Court.

That same lack of candor unfortunately infects Respondents' inaccurate characterization in their brief to this Court of what discovery later revealed about how GE handled the distribution of PAC funds to Members of Congress. Respondents' brief states (p. 4):

> The GE/PAC committee holds annual meetings at which an estimated contribution budget for the following year is approved. Before 1991, a PAC subcommittee would meet prior to the annual meeting with the GE government relations staff and *determine* a two-year line-by-line budget identifying contributions to particular candidates. (Emphasis added.)

The *GE/PAC committee* did not "determine" who would receive PAC funds, but merely rubber-stamped the determinations previously made by GE lobbyists, who prepared the list

of distributees for the PAC committee prior to its meeting. In fact, throughout the period of GE/PAC operations – over all the years covered by this case – GE's paid lobbyists in Washington controlled the allocation of PAC money to support their lobbying strategy. The GE/PAC committee has *never* exercised independent judgment on distribution of PAC money. The committee's function is to raise the money (with Chairman Welch's help) and the corporation's lobbyists' function is to pass it out to Members of the United States Congress.

GE Vice President Frank P. Doyle, who oversees the Washington lobbying office and reports directly to GE Board Chairman Welch, described the relationship between the GE/PAC committee and the Washington office in his deposition:

> Q. How would you describe the responsibility of the PAC committee as you know it?
>
> A. They either raise or oversee the raising of the money and they either set the budget or its distribution; they used to be more active than they are now. Now they do it in a more generalized way; they used to do it candidate-by-candidate, meeting-by-meeting.
>
> Q. Did they actually initiate the budget?
>
> A. No, they didn't; the budget is initiated in Washington by people who work Washington for us.
>
> Q. Then the budget is submitted to the committee for its approval?
>
> A. Yes.

Doyle also described the process before the 1991 change which eliminated the GE/PAC Committee entirely:

> Q. And you said the reason for that change was that over the years there had been very little change?

A. I was told that there was a lot of debate, a lot of back and forth, then in the end generally the money was allocated the way that the people in Washington saw to best allocate.

Q. The way it had originally been proposed by Washington corporate office?

A. Yes.

GE Vice President Doyle went on to describe how the purchase of tickets to Congressional fundraisers by GE's lobbyists set the stage for him to communicate directly with the Members themselves:

Q. Do you know who in the Washington office actually attends the fundraisers?

A. Yes, I do.

Q. Who are they?

A. Phil Peter, Bob Barrie, Neil Messick, Bill McManus, Dick Cook before his illness, Ann Canfield.

Q. How do you know that?

A. They are always complaining about it; it's a good part of what they do. When I ask to see one of them they will usually tell me about it.

Q. When you say it's a good part of what they do, it takes up a fair amount of time?

A. It takes up their evenings.

When Doyle himself went to see Members of Congress to discuss legislative issues, he would have the appropriate GE lobbyist set up the appointment and accompany him to the meeting:

Q. When you are not testifying but are seeing members on issues, what is the process you go through; do you actually call on them in their offices?

A. Yes. Normally the way it works is I will, assuming I am initiating, I will ask either through Phil or more likely directly, if it's a republican or democrat, find out who in Washington has regular contact with that member, ask they set up a meeting, convey the purpose of it, then we go, either responding to some piece of legislation that's developing on which we want to be heard or on more general subjects.

Q. You actually talk directly with the member?

A. Yes.

Q. Do you go alone?

A. Almost, no, I would say never.

Q. You are accompanied by whom?

A. Usually one of Phil Peter's people; occasionally by Phil himself.

Q. When you said the person in Washington who makes the contact, that's somebody on Phil Peter's staff?

A. If it's a democrat we will call on usually Bob Barrie; if it's a republican it's usually Neil Messick.

Q. You don't yourself call up and make the appointment?

A. No; one of those gents would.

These are exactly the types of direct communication with Members flowing from the use of PAC funds that trigger the statutory reporting requirements under FRLA.

ERRORS IN RESPONDENTS' ARGUMENTS ON THE WRIT

Respondents argue that "the sole issue before this Court is one involving state law" (p. 6). This is plainly incorrect. There is no issue of state law. The relevant state law is well settled: violation of a federal criminal statute (such as FRLA) constitutes corporate waste as a matter of law. *See e.g., Miller v. American Telephone & Telegraph Company*, 507 F.2d 759 (3d Cir. 1974), in which the Third Circuit Court of Appeals, interpreting New York law, declared that shareholders properly alleged that corporate directors had breached their duty by permitting violation of a federal statute which prohibited corporate campaign spending. *See also Abrams v. Allen*, 297 N.Y. 52, 56 (1947).

The sole question to be decided in this case is whether Respondents' failure to report the corporation's use of PAC money for lobbying purposes violates FRLA (and thereby constitutes corporate waste). Interpretation of FRLA is what controls that question, which is why the writ should be granted.

This petition does not seek to revisit questions already decided in *United States v. Harriss*, 347 U.S. 612 (1954) as also argued by Respondents (p. 8). What this petition seeks is an interpretation of FRLA itself as it applies to the solicitation of PAC funds by the corporation to pay the corporation's lobbyists' expenses in attending Congressional fundraisers to pave the way to communicate with the Members on specific legislative issues.

Although the Courts have said that such use of PAC funds is permitted under the FECA, they have *never* addressed the question whether such use is also reportable under the FRLA. Nothing in *Harriss* says contributions solicited for lobbying *by the corporation* (as contrasted to an exempt political committee) are excluded from FRLA Section 307. (2 U.S.C. Section 266) The question is presented here for the first time.

This issue is of major public importance because it determines the public's right to know that legislative issues are being influenced by PAC sponsors who use their PAC money for lobbying

purposes rather than to support candidates in contested elections. The whole purpose behind FRLA is public disclosure, and the statute should be interpreted to carry out its purpose and intent.

Respondents also misstate the PAC's function as "solicitation of *campaign* contributions" (p. 7; emphasis in original). This is a total inversion of what actually happens. GE/PAC committee members do *not* solicit "campaign" contributions; they openly solicit funds to be used for lobbying purposes by GE's lobbyists under the guise of campaign contributions. As pointed out in our original petition (p. 19), this is the type of indirection the statute was intended to cover, as reflected in statutory references to "directly or indirectly" and "in any manner whatsoever." When PAC funds were solicited from GE employees, the corporation openly acknowledged that the money would be used for corporate lobbying. That is why FRLA was violated when the corporation failed to report these activities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
August 11, 1994

Respectfully submitted,

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